

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**
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Report Summary

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Joyce L. Kennard, Chair
Ben McClinton, Committee Counsel (415) 865-7711

DATE: April 10, 2000

SUBJECT: Appeals—Amicus Curiae Briefs by the Attorney General and Time
Limits (amend rules 14(b)–(c) and 105(b)) (Action Required)

Issue statement

In California, the Attorney General cannot file an amicus curiae brief in an appellate court without obtaining the permission of the Chief Justice or a presiding judge. The Attorney General asserts that some courts without cause are refusing to allow his office to file amicus briefs. The current rules do not specify any time limits in the Courts of Appeal for filing an amicus brief or an answer.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council effective July 1, 2000, amend rules 14(b)–(c) and 105(b) to:

- (1) Allow the Attorney General to file an amicus curiae brief without obtaining the permission of the Chief Justice or a presiding judge; and
- (2) Specify time limits in the Courts of Appeal for the Attorney General to file an amicus brief and for a party to file an answer to it.

The text of the proposed amendments is attached at pages 5–7.

Rationale for recommendation

The Attorney General has requested a rule change to allow him to file amicus curiae briefs without obtaining the permission of the Chief Justice or another presiding judge. The federal rules allow the “United States or its officer or agency” to file an amicus brief without the consent of the court. (Fed. Rules App.Proc., rule 29(a); see also U.S. Supreme Ct. Rules, rule 37(b).)

Basic proposal: A majority of the Appellate Advisory Committee proposes that the Attorney General be allowed to file amicus briefs without permission, subject to certain time limits in the Courts of Appeal. The amended rules would allow the Attorney General to file without permission only if he or she is not presenting the brief on behalf of another state officer or agency.

Time limits: Rule 14(b), concerning amicus in the Supreme Court, establishes a 30-day deadline after the last possible brief to file amicus briefs, with 20 more days allowed to file an answer.

Rule 14(c) for the Courts of Appeal does not set *any* time limits, leaving it up to the presiding justice to set a time limit for filing—and, incidentally, to determine whether the amicus brief is too late in the appeal process. The presiding justice also sets a time for the filing of the answer.

The federal rules require all amicus briefs to be filed within seven days after the filing of the “principal” brief of the party supported by the amicus brief, with just seven days allowed to answer (U.S. Supreme Ct. Rules, rules 37(b)(4); Fed. Rules App.Proc., rule 29(e)).

If the Attorney General receives the *right* to file an amicus brief, the advisory committee believes some time limits will be needed to ensure that the appeal will not be unreasonably delayed.

Proposed time limits: Under the proposed amendments, the Attorney General must file an amicus brief in the Supreme Court within the same time limit as any other amicus must file a request to file a brief—30 days after all briefs have been (or could have been) filed.

In a Court of Appeal, the Attorney General would be required by amended rule 14(c) to file any amicus brief within 14 days after the respondent’s brief—or the return in writ proceedings—is filed. The committee believes that allowing a longer period would delay the appeal process unnecessarily.

The Attorney General would, of course, be allowed to request *permission* to file an amicus brief at any time before or after the time limit in amended rule 14(c). If the request is granted, the presiding justice could then set time limits for filing and replying.

Time to file the answer: Under the proposed amendments, the answer to the Attorney General’s amicus brief must be filed within 20 days in the Supreme Court (no change) and within 14 days in the Courts of Appeal.

Appellate division of superior court: Proposed amendments to rule 105—applicable to the appellate division of superior court—would allow the Attorney General to file amicus briefs without obtaining permission, but the presiding judge would be allowed to prescribe reasonable conditions for filing and answering the brief.

Alternative actions considered

A strong minority on the committee objected to the proposal as an interference with the presiding justice’s discretion in allowing *any* amicus curiae briefs to be filed without a showing of benefit to the court’s decision-making process.

The committee was aware, however, that before approaching the Chief Justice, the Attorney General had proposed introducing draft legislation that would have required the courts to allow the Attorney General to file amicus curiae briefs. The committee consensus was that it would be better to allow the Attorney General to file amicus briefs by rule, so that the courts could keep control over the procedure. For example, the amended rule would impose time limits on the Attorney General so that the case process would not be unreasonably delayed.

Comments from interested parties

The proposal was circulated for comment during a special comment period, February 18 through March 20 (item SP00-1). Late comments were accepted.

The Rules Amendments Subcommittee considered carefully the 13 comments that were submitted. Three respondents opposed the proposal, and four supported it with suggested modifications to the rules.

An appellate presiding justice and a trial court judge oppose the proposal because the change would move the discretion from the court to the Attorney General. The committee is concerned about this loss of judicial discretion, but observes that adopting the proposal as a rule change—rather than having it imposed by legislation—affords the judicial branch more control over the procedures and allows certain limits (e.g., time) to be placed on the Attorney General.

The State Public Defender’s Office and the California Appellate Project oppose the proposal. The State Public Defender’s Office maintains that the existing system “seems to work perfectly well” and that the proposal would place a burden on the appellate courts. The California Appellate Project finds it “troubling that one state agency should take the position that it, and no one else, should be vested with the right to file an amicus brief in any case, without a showing of an interest in the case or permission from the court.” They see this as giving the Attorney General an unfair advantage.

The committee believes the proposed rule change is justified by the Attorney General's singular status as the state's chief law officer with responsibility to (1) ensure that the laws are uniformly and adequately enforced, (2) supervise the district attorneys and sheriffs (Cal. Const., art. V, § 13), and (3) attend the Supreme Court (Gov. Code, § 12519) and—by implication—the Courts of Appeal. The proposed change would apply *only* if the Attorney General filed an amicus brief in his or her own name, and not as attorney for another state officer or agency as *amicus curiae*. In the limited circumstances to which the proposal applies, the new provision would parallel the uniform federal procedure that gives to the state attorneys general the right to file without the necessity of obtaining permission from the reviewing court. (U.S. Supreme Ct. Rules, rule 37(b)(4); Fed. Rules. App.Proc., rule 29(a).) The proposal would give California's Attorney General the same prerogative in California courts.

A judge experienced in juvenile court matters expressed concern about juvenile dependency court writs under rule 39.1B: "The timelines for hearing these writs are very tight. Permitting the Attorney General to file an amicus brief would slow the process significantly. I propose to exclude these cases." The committee determined from the Attorney General's Criminal Law Division (where dependency appeals and writs are handled) that involvements in appellate court writ proceedings to review dependency determinations are extremely rare. Indeed, no one could recall *ever* having filed an *amicus curiae* brief in a rule 39.1B proceeding. The rule can be adjusted if experience proves there are problems with delay in these proceedings.

A chart showing the comments and the committee's responses is attached at pages 8–11 .

Implementation requirements and costs

The courts and staff should have no need to take any significant measures to implement the recommendation, and no serious impediments to implementation are apparent. The recommended actions will result in some increased costs to the courts that must review additional Attorney General's amicus briefs and to the litigants who oppose them, but the number of briefs is expected to be small.

Attachments

RULE AMENDMENTS

Amicus Curiae Briefs No Permission Required for the Attorney General to File

Rules 14(b)–(c) and 105(b) of the California Rules of Court are amended effective July 1, 2000, to read:

Rule 14. Additional briefs

(a) [Respondent’s brief] * * *

(b) [Brief of amicus curiae in Supreme Court] An individual or entity desiring to support or oppose (1) the granting of a petition for review or original writ in the Supreme Court, or (2) the accepting of a request for an answer to a certified question under rule 29.5, shall lodge a letter in the Supreme Court in lieu of a brief of amicus curiae. The letter shall state the nature of the applicant’s interest and conform to the requirements of rule 28(e) regarding incorporation of documents by reference and annexed material. The letter shall be accompanied by proof of service on each party to the action or proceeding and, if the letter concerns a request for an answer to a certified question, on the requesting court. The court may, in its discretion, elect to consider the letter and may, in its discretion, cause the letter to be filed in the action or proceeding. The fact that a person lodged a letter on the question of granting the petition or of accepting the request does not constitute leave for that person to file a brief amicus on the merits if the petition is granted or the request is accepted; all persons seeking to file a brief amicus on the merits shall comply with the requirements of the next paragraph and briefs on the merits in the Supreme Court shall conform as nearly as possible to the requirements of rule 29.3(c).

A brief of amicus curiae in the Supreme Court on the merits of an action or proceeding may be filed on permission first obtained from the Chief Justice. To obtain permission, the applicant shall file with the clerk of the Supreme Court a signed request, accompanied by the proposed brief, stating the nature of the applicant’s interest and setting forth facts or questions of law that have not adequately been presented by the parties and their relevancy to the disposition of the case. The request and proposed brief must be received by the court no later than 30 days after all briefs, other than supplemental briefs, that the parties are entitled to file pursuant to rule 29.3 either have been filed or can no longer be filed within the time limits prescribed by that rule. The Chief

1 Justice may grant leave for later filing if the applicant presents specific
2 and compelling reasons for the delay. ~~Any answer to an amicus curiae~~
3 ~~brief shall be filed by the parties no later than 20 days after the filing of~~
4 ~~the amicus curiae brief. Before the amicus curiae brief or an answer is~~
5 ~~filed, it shall be served on all parties. If the brief is in support of the~~
6 ~~position of one of the parties, that fact shall be noted on the cover of the~~
7 ~~brief.~~

8
9 The Attorney General may file an amicus curiae brief without obtaining the
10 Chief Justice's permission, unless the Attorney General is presenting the brief
11 on behalf of another state officer or agency. The Attorney General shall file
12 the brief within the time provided above for receipt of a request for
13 permission to file an amicus curiae brief. The brief shall contain the
14 information required in a request for permission to file an amicus curiae
15 brief.

16
17 Before any amicus curiae brief is filed, it shall be served on all parties.
18 The cover of the brief shall identify the party—if any—the brief
19 supports.

20
21 Any party may file an answer within 20 days after an amicus curiae
22 brief is filed. Before any answer is filed, it shall be served on all parties
23 and the amicus curiae.

- 24
25 (c) **[Brief of amicus curiae in Court of Appeal]** A brief of amicus curiae
26 in a Court of Appeal on the merits of an action or proceeding may be
27 filed on permission first obtained from the presiding justice subject to
28 conditions which may be prescribed. To obtain permission, the
29 applicant shall file with the clerk of the reviewing court a signed request
30 that states the nature of the applicant's interest and specifies the points
31 to be argued in the brief. The request shall state that the applicant is
32 familiar with the questions involved in the case and the scope of their
33 presentation and believes there is a necessity for additional argument on
34 the points specified. If the application is granted, the time within which
35 the brief may be filed and the time within which any party to the appeal
36 may file an answer to it shall be specified. ~~Before the amicus curiae~~
37 ~~brief or an answer is filed, it shall be served on all parties. If the brief is~~
38 ~~in support of the position of one of the parties, that fact shall be noted~~
39 ~~on the cover of the brief.~~

40
41 The Attorney General may file an amicus curiae brief without obtaining the
42 presiding justice's permission, unless the Attorney General is presenting the
43 brief on behalf of another state officer or agency. The Attorney General
44 shall file the brief within 14 days after the last respondent's brief—or

1 the return—is filed. The brief shall contain the information required in
2 a request for permission to file an amicus curiae brief. Any party may
3 file an answer within 14 days after the Attorney General files a brief.

4
5 Before any amicus curiae brief is filed, it shall be served on all parties.
6 Before any answer is filed, it shall be served on all parties and the
7 amicus curiae. The cover of the brief shall identify the party—if any—
8 the brief supports.

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11 (d) [Briefs on cross-appeal] * * *

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14 **Rule 105. Briefs and records**

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16 (a) * * *

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18 (b) [Brief of amicus curiae] A brief of amicus curiae may be filed on
19 permission first obtained from the presiding judge, ~~and~~ subject to
20 conditions ~~which~~ he or she may prescribe. If ~~such~~ the brief is in support
21 of the position of one of the parties, that fact shall be noted in ~~its~~ the
22 brief's heading.

23 The Attorney General may file an amicus curiae brief without obtaining the
24 presiding judge's permission, unless the Attorney General is presenting the
25 brief on behalf of another state officer or agency; but the presiding judge
26 may prescribe reasonable conditions for filing and answering the brief.

27
28
29 (c)–(f) * * *

**Comments for
Appeals^{3/4} Amicus Curiae Briefs by the Attorney General and Time Limits**

	Commentator	Position	Comment on Behalf of Group	Comments	Committee Response
1.	John A. Clarke, Executive Officer-Clerk Hannah Inouye Los Angeles Superior Court		Yes	Rule 14—No Comment. There is no effect on the Los Angeles Superior Court. Rule 105—No Comment. There is very little effect on the Appellate Division.	N/A
2.	Robert Liston Clerk-Administrator Court of Appeal, Third Appellate District	A		Add the word “last” before the words “respondent’s brief—or return—is filed.” in the new paragraph in section C.	The committee agrees and has added the word to rule 14(c).
3.	Hon. Roberta McPeters Presiding Judge San Bernardino County Superior Court	AM		Time limits would ensure prompt attention to process and place responsibility for those time lines on interested parties.	The issue of imposing time limits on <i>all</i> parties will be referred to the committee’s Appellate Rules Project Task Force, which is revising all the rules on appeal.
4.	George Palmer Head Deputy District Attorney Los Angeles County Distirct Attorney’s Office	AM	Yes	As a spokesperson for my office and the California District Attorneys Association (CDAA), I agree that the Attorney General, the chief law enforcement officer in the State, should be permitted to file amicus curiae briefs without prior permission of the Chief Justice or other presiding justice or other presiding justice. Such rule is appropriate particularly in light of the role played by the Attorney General’s Office in criminal (and other) appellate litigation in California. * * *	This proposal will be forwarded to the Appellate Rules Project Task Force for consideration when it proposes time limits on <i>all</i> amicus filers in the Courts of Appeal.
				Accordingly, if the Appellate Rules Project Task Force proposes to further amend the rules to place explicit time limits on amici other than the Attorney General, it is respectfully requested that the time limit proposed for Court of Appeal amicus briefs be set at 20 rather than 14 days. I also believe that a 20-day time limit would be appropriate for the Attorney General.	
5.	Hon. Robert E. Thomas, Chair Rules and Forms Committee	N	Yes	This has the real potential for creating more work for our Appellate courts. No statement of need has been provided. The current rule provides for an exercise of	The additional work will be minimal. The Attorney General has established that there is a need for the rule, even if the number of

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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	Orange County Superior Court			discretion by a Justice of the Appeals Court.	denials is small.
6.	Douglas W. Nelson Assistant County Counsel Madera County Counsel	A			N/A
7.	Hon. Alfred G. Chiantelli Presiding Judge San Francisco Superior Court	A		This is a tempest in a teapot.	N/A
8.	Hon. Gary Strankman Administrative Presiding Justice Court of Appeal, First Appellate District	N		Unnecessary. This change simply moves the discretion from the court to the Attorney General.	Adopting the proposal as a rule change—rather than having it imposed by legislation—affords the judicial branch more control over the procedures and allows certain limits (e.g., time) to be placed on the Attorney General.
9.	Hon. Leonard Edwards Judge Santa Clara County Superior Court	AM		I am concerned about juvenile dependency court writs (CRC 39.1B). The timelines for hearing these writs are very tight. Permitting the Attorney General to file an amicus brief would slow the process significantly. I propose to exclude these cases.	The committee determined from the Attorney General's Criminal Law Division (where dependency appeals and writs are handled) that any involvement in appellate court writ proceedings to review dependency determinations is extremely rare. Indeed, no one could recall <i>ever</i> having filed an amicus curiae brief in a rule 39.1B proceeding. The rule can be adjusted if experience proves there are problems with delay in these proceedings.
10.	Emry J. Allen Chief Attorney Office of the State Public Defender	N	Yes	<p>Although the proposal would not apply to cases in which the Attorney General is litigating against the Office of the State Public Defender (OSPD), OSPD nevertheless opposes the proposed amendments...</p> <p>We note that the existing mechanism for presenting amicus briefs to the reviewing courts seems to work perfectly well. We have been provided with no reason for changing the system in such a way as to excuse the</p>	The committee believes the proposed rule change is justified by the Attorney General's singular status as the state's chief law officer with responsibility to (1) ensure that the laws are uniformly and adequately enforced, (2) supervise the district attorneys and sheriffs (Cal. Const., art. V, § 13), and (3) attend the Supreme Court (Gov. Code, § 12519) and—by

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	Commentator	Position	Comment on Behalf of Group	Comments	Committee Response
				Attorney General from complying with the same rules that all other litigants must observe. Moreover, the proposed amendments would create a new scheme for the filing of amicus briefs which the reviewing courts would be required to administer. The presiding justices of the various reviewing courts may be willing to assume this burden; if so however, those views have not been expressed to us. Unless and until we are presented with some rationale which would support the proposed amendments from a public policy standpoint, we must oppose the proposed amendments.	implication—the Courts of Appeal. The proposed change would apply <i>only</i> if the Attorney General files an amicus brief in his or her own name, and not as attorney for another state officer or agency as amicus curiae. In the limited circumstances to which the proposal applies, the new provision would parallel the uniform federal procedure that gives to the state attorneys general the right to file without the necessity of obtaining permission from the reviewing court. (U.S. Supreme Ct. Rules, rule 37(b)(4), Fed. Rules. App.Proc., rule 29(a).) The proposal would give California’s Attorney General the same prerogative in California courts.
11.	Hon. Dennis A. Umanzio Superior Court Commissioner Yolo County Superior Court	A			N/A
12.	Richard M. Frank Chief Assistant Attorney General Attorney General ’s Office	AM	Yes	<p>The proposed rules impose time limits on the Attorney General’s permission as of right to file an amicus curiae brief. The Attorney General agrees with the Judicial Council that the prerogative created by the proposed rules should be subject to reasonable time restrictions. The Attorney General believes that the time limits proposed for Rule 14(b) and (c) are appropriate.</p> <p>There is one significant way in which the proposed rule changes could be improved. Occasionally, the Attorney General perceives the need to appear as amicus in California trial courts. Yet the proposed rules overlook such trial court filings. <i>Accordingly, the Attorney General recommends that a comparable amendment to the [rules] allow such trial courts</i></p>	The committee will refer this proposal to the Civil and Small Claims Advisory

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	Commentator	Position	Comment on Behalf of Group	Comments	Committee Response
				<i>amicus filings as of right, subject to the same type of reasonable time restrictions noted above.</i>	Committee for its consideration.
13.	Linda Robertson Staff Attorney California Appellate Project	N	Yes	We find it troubling that one state agency should take the position that it, and no one else, should be vested with the right to file an amicus brief in any case, without a showing of an interest in the case or permission from the court. The Attorney General plays a number of roles, including that of prosecutor in California. It is hardly an impartial or non-partisan participant in all litigation in this state. While the number of amicus briefs the Attorney General files may not be very great, an amendment permitting it to file pleadings without prior permission will give it an advantage – hard to measure, but present nonetheless – over people and organizations who must seek the courts’ leave to participate in litigation as amici. In the long run, the proposed amendment erodes the notion that the people of the state, and all the interests we represent, are entitled to some parity of access to the legal process.	See response under item 10 above.

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